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IN THE

Supreme Court of the United States

October Term, 1960

No. 373

ROY R. TORCASO, *Appellant*,

v.

CLAYTON K. WATKINS, *Clerk of the Circuit Court for Montgomery County, Maryland.*

On Appeal from the Court of Appeals of the State of Maryland

BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

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BRIEF FOR THE AMERICAN ETHICAL UNION AS *AMICUS CURIAE*

The Interest of the American Ethical Union

The American Ethical Union is a federation of all the Ethical Culture Societies and Groups in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement". The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. The Movement has had a marked growth in recent years. Since 1949 membership has doubled and the number of Societies and Groups has increased four-fold. Today, there

are twenty-eight Societies and Groups in eleven states (including the State of Maryland) and the District of Columbia.

The American Ethical Union is a member of the International Humanist and Ethical Union, which has held two International Congresses and which will hold a third, in Oslo, in 1962. The member organizations include groups from the United States, Great Britain, Belgium, Holland, Austria, India, Norway, France, Germany, Japan and South Africa.

The Ethical Movement has been widely recognized as a religion. It is listed as a religion in the Census of Religious Bodies published by the Federal Government,[1] and in various religious publications[2] and general reference works.[3] Federal tax exemption rulings have been issued to The American Ethical Union and to the various Ethical Societies, including, it might be noted, the Baltimore Ethical Society situated within the State of Maryland. The District of Columbia Society has been held to be "a religious corporation or society," the building of which "is one primarily and regularly used by its congregation for public religious worship," within the meaning of the District of Columbia Code provision exempting property of "religious societies" from certain local taxes. *Washington Ethical Society* v. *District of Columbia*, 249 F.2d. 127 (D. C. Cir. 1957). All the Ethical Societies and Groups con-

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1 U. S. Bureau of the Census, Dep't. of Commerce, *Religious Bodies, 1936* (1941).

2 *Yearbook of American Churches* (Landis ed. 1958); *A Guide to the Religions of America* (Rosten ed. 1955); Burtt, *Types of Religious Philosophy*. (1939); Ferm, ed. *Religion in the Twentieth Century* (1948); 5 *Encyclopedia of Religion and Ethics* (Hastings ed. 1928).

3 Hutchinson, *Twentieth Century Encyclopedia* (rev. ed. 1952); 21 *Dictionary of American Biography* (Starr ed. 1944); 8 *Encyclopedia Brittanica* (14th ed. 1932); 10 *Encyclopedia Americana* (1947 ed.).

duct services and religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

The Ethical Movement has no fixed creed or dogma, and requires no particular theological beliefs of its members. It

> "holds that, although the universe which we all share, speaks to us in different accents or tongues, no one can be sure, or prove to others, which one is true. The Ethical Movement therefore, is uncommitted on theological and metaphysical questions. Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such question. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind." [*Do You Know the Ethical Movement?*, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3]

The issue in this case—whether a State may require, as a condition of holding public office, that a person declare his belief in the existence of God—is a matter of serious concern to the American Ethical Union. We believe that the decision below, which upholds the denial to appellant of a

Commission as a Notary Public by the State of Maryland solely because of his refusal to declare such belief, poses a threat to all non-theistic and liberal religions in this country, that is, to religious groups, such as the Ethical Movement, which do not require, as an essential element of their "faith," an affirmative belief in the existence of a Supreme Being. The freedom of religion protected against State interference by the First and Fourteenth Amendments includes the right to hold and practice any belief that an individual considers his religion. See *United States* v. *Ballard*, 322 U. S. 78, 86-88 (1944); *Follett* v. *McCormick*, 321 U. S. 573, 577 (1944). We believe that this right is seriously weakened if a State can ban from public office those whose religious beliefs are non-theistic.

ARGUMENT

Non-Theistic Belief Constitutes a Religion which is Entitled to the Protection of the First and Fourteenth Amendments.

Introduction

The Fourteenth Amendment makes applicable to the States the prohibition in the First Amendment that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson* v. *Board of Education*, 330 U. S. 1, 8 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203, 210 (1948). Appellant contends that the provision in Article 37 of the Declaration of Rights in the Maryland Constitution, which, as interpreted by the Maryland Court of Appeals, requires an applicant for a Commission as a Notary Public to declare his belief in the existence of God (R. 14-17), is unconstitutional because it is both a law respecting an establishment of religion, and one prohibiting the free exercise thereof.

A critical inquiry in determining those questions is whether a religious group is outside the Constitutional protection merely because it does not affirmatively profess a belief in the existence of a Supreme Being. The decision below, by denying the right to hold public office to those who refuse to declare their belief in the existence of God, treats such individuals less favorably than those who hold and are willing to declare such belief. If, as we believe clearly to be the case, the so-called "non-theistic" religious groups are just as much a "religion" in the constitutional sense as the traditional faiths which proclaim the existence of a Supreme Being (see *infra*, pp. 6-10, 12-14), then the decision below plainly prefers certain religions (the theistic) over others (the non-theistic). It is settled, however, that "[n]either a state nor the Federal Government can * * * prefer one religion over another." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947); *McCollum* v. *Board of Education*, 333 U. S. 203, 210 (1948).

Since the legal arguments will be fully presented by appellant, we shall not repeat them here. We think it may be helpful to the Court, however, to present certain non-legal material which bears upon the issue. Accordingly, we shall describe the religious beliefs of the non-theistic movement in the United States, trace its history and development, and show that today the movement is recognized and treated as just as truly a religion as the traditional faiths which profess a belief in a Supreme Being. We shall also urge that the religious freedom of the traditional theistic faiths cannot be maintained unless the religious freedom of the non-theists and other dissenters is also kept inviolate.

A. The Beliefs of the Non-Theistic Religions

Non-theism is a view which neither categorically denies, nor dogmatically affirms, the existence of a Supreme Being. Recognizing the limitations and the fallibility of the human intellect and the proper restriction of its use to matters of experience, non-theism argues that the existence or non-existence of God is not susceptible of proof and should, therefore, be left entirely within the realm of private belief. Organized non-theistic religious groups, such as the Ethical Culture Societies, include members whose personal faith includes a Supreme Being, and those whose personal faith does not.

As long ago as 1886, Felix Adler, founder of the Ethical Movement, pointed out:

> "Religion is not identical with theology. It is indeed often maintained that the belief in a personal God should be regarded as the foundation and criterion of religion * * *."
>
> * * *

But, he added,

> "It is the moral element contained in it that alone gives value and dignity to any religion, * * *. The appeal to conscience has ever been the lever that raised mankind to a higher plane of religion."[4]

More than two decades ago John Dewey wrote *A Common Faith*, devoted to separating "the religious phase of experience * * * from the supernatural and the things that have grown up about it." [Dewey, *A Common Faith* (1934) p. 2.] He wrote that religious qualities "are not bound up with any single item of intellectual assent, not even that of the existence of the God of theism" (*Ibid* p. 32). To him "religious" signified an attitude, "independent of the supernatural" (*Ibid* p. 66).

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4 Adler, *Creed and Deed* (1886), pp. 37, 163-164.

In his book, *Ethics as a Religion* (1951), Dr. David Saville Muzzey, a Leader in the Ethical Culture Movement, points out (pp. 86-87) that "Everybody except the avowed atheists (and they are comparatively few) believes in some kind of God", and that "The proper question to ask, therefore, is not the futile one, Do you believe in God? but rather, What *kind* of a God do you believe in?" In an attempt to answer that question Dr. Muzzey continues (p. 95):

> "Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that expresses itself in the human world as the power which inspires in man moral purpose."
>
> * * *
>
> "Thus the 'God' that we love is not the figure on the great white throne, but the perfect pattern, envisioned by faith, of humanity as it should be, purged of the evil elements which retard its progress toward 'the knowledge, love and practice of the right.'"

Lord Snell, a former President of the British Ethical Union, described the non-theistic position of the Ethical Culture Movement as follows:

> "The central purpose of the Ethical Culture Movement is to establish in the world a religion devoted to the right, apart from supernatural sanctions * * * With regard to the ultimate nature of things, a life after death and the final goal of the universe, the Ethical

Movement affirms no creed. Its members may have divergent views on these problems but they unite in devotion to good action in the world in which they live."[5]

The viewpoint of the Humanist Movement has been set forth by Curtis W. Reese, Secretary, Western Unitarian Conference, as follows:

"To Humanism 'worship' means the reverential attitude toward all that is wonderful in persons and throughout all of life; a wistful, hopeful, expectant attitude of mind, not abject homage to either 'Humanity' or 'God' • • •

"Humanism is not Atheism. Atheism is properly used as a *denial* of God • • • [T]he Humanist attitude toward the idea of God is *not that of denial* at all; it is that of *inquiry*. The Humanist is questful; but if the quest be found fruitless he will still have his basic religion intact, viz., the human effort to lead an abundant life." (Reese, ed., *Humanist Sermons* (1927), pp. vii, viii. Emphasis in original.)

A more • statement of the non-theistic, humanistic approach t• oblems of belief is set forth in an article by Professo• . Nielson of Amherst College:[6]

"Religion is not a kind of science—not even a 'supra-science'; nor is it any other kind of a *theory*. It is instead a practical activity with some reasonably definite functions. Religious discourse is essentially a figurative, non-literal discourse • • • [R]eligious utterances are ritualistic or ceremonial utterances that express our basic commitments and concerns.

• • •

5 Quoted by W. Edv in Collier in *The Standard* (Jan.-Feb. 1951) p. 223.

6 Religion and the Modern Predicament, *The Humanist*. (Jan.-Feb. 1958) pp. 26, 28, 29.

"The function of religion in a culture in crisis (or for that matter in any culture) is to serve as a figurative expression of the regulative maxims that guide men's lives and express their ultimate concerns.

• • •

"I would argue that a resolute humanism is best able to meet men's religious needs in a democratic and scientifically oriented society • • • [It] can see the creativity in all religious expressions without assuming the uniqueness or dominance of any single symbolic form • • • [and] can see and assert the religious (ideal) qualities in natural experience.

• • •

"Humanism does not, as it is often parodied as doing, worship man's ego-centered image of his own divinity, though humanism quite rightly recognizes and emphasizes man's worth and dignity • • • The object of worship for a humanist is indeed man; but here the noun 'man' is understood collectively as denoting all mankind, and not as denoting man taken distributively with his masterless egocentric worship of his individual ego's lusts to power."

These samples of Humanist and Ethical Culturist nontheistic thought could be multiplied many times by quotations from world-renowned philosophers and psychologists. Alfred North Whitehead declared that "Religion is what the individual does with his own solitariness." A. Eustace Haydon conceives of religion as "the shared quest for the good life." Erich Fromm recognizes nontheistic as well as theistic religions and defines religion as "any system of thought and action shared by a group which gives the individual a frame of orientation and an object of devotion." And the celebrated biologist, Julian Huxley, has recently written:

"I have called this book *Religion without Revelation* in order to express at the outset my conviction that religion of the highest and fullest character can co-exist with a complete absence of belief in revelation in any straightforward sense of the word, and of belief in that kernel of revealed religion, a personal god." [7]

B. The History and Development of Non-Theistic Religion

The roots of the non-theistic religious movement in Western culture go far back. Such views are found in the Middle Ages, and during the renaissance there was a resurgence of non-theistic philosophy and a renewed interest in human problems and the concept of the dignity of man.[8] Non-theistic religious views are found in Jewish thought of the sixteenth and seventeenth centuries,[9] and in the writings of Spinoza,[10] Kant,[11] Auguste Comte, and John Stuart Mill.[12] In the early days of the United States, Benjamin Franklin, Thomas Jefferson, Thomas Paine and many oth-

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7 Whitehead, *Religion in the Making* (1926), p. 16; Haydon, as quoted in Morain, *Humanism as the Next Step* (1954), p. 12; Fromm, *Psychoanalysis and Religion* (1950), p. 21; Huxley, *Religion without Revelation* (1957), p. 1.

8 Kristeller, in Ferm, ed., *A History of Philosophical Systems* (1950), pp. 227-238; Cassirer, Kristeller and Randall, *The Renaissance Philosophy of Man* (1948).

9 Rivkin, *Leon da Modena and the Kol Sakhal* (1952), pp. 6-17.

10 Wolfson, *Philo: Foundations of Religious Philosophy in Judaism, Christianity and Islam* (1947), pp. 458-459.

11 Kant, *Critique of Pure Reason* (1781), Book II, §2, Chap. III, §7; Tsanoff, *The Great Philosophers* (1953), p. 455.

12 Aiken, ed., *The Age of Ideology: The 19th Century Philosophers* (1956), pp. 122-123; Mill, *Nature and the Utility of Religion* (1958), pp. 68-69.

ers expressed interest in the development of a religion based on reason rather than revelation.[13]

It was during the nineteenth century, however, that non-theistic religious movements developed significantly in American life. It was, in part, the revolt against dogmatism which led the New England Unitarians to transmute the traditional concept of divine Christ to the concept of a human Jesus, a great moral teacher and leader. William Ellery Channing, their most distinguished leader, said "the adoration of goodness—this is religion."[14] The transcendentalism of Emerson[15] and Thoreau[16] and the "manly theology" of Theodore Parker,[17] were primarily concerned with man and his relation to his fellow-man. Their basic concern was to subordinate inconclusive debate about the existence and nature of God to an attempt to improve human society by furthering humaneness in the relations between man and man.

After the Civil War, non-theistic religious movements in the United States began to multiply. Unlike the pre-Civil War groups, which had attempted to establish Utopian communities,[18] the newer movements continued to

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13 Schneider, ed., Benjamin Franklin; *The Autobiography and Selections* (1952) xiv, 57.

14 2 Parrington, *Main Currents of American Thought* (1930), p. 332.

15 Schneider, *A History of American Philosophy* (1946), Ch. 25; Blau, *Men and Movements in American Philosophy* (1952), pp. 121-131; Blau, ed., *American Philosophic Addresses, 1700-1900* (1946), pp. 586-604.

16 Blau, *Men and Movements in American Philosophy* (1952), pp. 131-141; Cargill, ed., Henry Thoreau: *Selected Writings on Nature and Liberty* (1952), pp. 56-107.

17 Schneider, *A History of American Philosophy* (1946) Ch. 24; Dirks, *The Critical Theology of Theodore Parker* (1948); Commager, *Theodore Parker* (1936).

18 Such communities included Brook Farm and Fruitlands, and the communal village of Modern Times (now called Brentwood) on Long Island in New York State. See Hinds, *American Communities* (2d ed. 1908).

live in the world and to attempt to change it by participating in social reforms. Out of the Unitarian group there began in 1866 the important Free Religious Association, which Emerson joined in his later years. The Association was most influential in its insistence that social reform activities were an integral part of religious faith, and in its refusal to make acceptance of theism a condition of membership.[19] Felix Adler, founder of the Ethical Movement, was a member of the Free Religious Association for ten years. He resigned its presidency in 1882 and devoted himself to the Society for Ethical Culture in New York City, which he had founded several years before, in 1876.

C. Non-Theistic Belief Is Today Recognized as Religious.

A clear recognition of the religious character of non-theistic belief is shown, we believe, by the proceedings at a Seminar on Religion in a Free Society, held in New York City in 1958 under the sponsorship of the Fund for the Republic, Inc. In the first session of this seminar, Father John Courtney Murray, one of the leading Roman Catholic theologians in the United States, read the principal paper: *Religious Pluralism and Civil Unity.* One theme to which Father Murray devoted particular attention was the existence in the United States of four major religious groupings. These were the three traditional major religions of Roman Catholicism, Protestantism and Judaism, and a fourth, to which Father Murray assigned the name "Secularist."[20]

At the final session of the seminar, Father Joseph Gremillion took note of Father Murray's fourth grouping, and pointed out that formal presentations had been made only

19 Persons, *Free Religion, An American Faith* (1947), pp. 71, 154.

20 *Religion and Freedom.* Report by Donald McDonald on a Seminar sponsored by the Fund for the Republic (1958), pp. 5-7.

by representative spokesmen of the first three faiths. He urged that a "secularist" be called upon. Professor Horace Kallen of the New School for Social Research in New York City was granted permission to, and did, address the group on behalf of the "fourth faith," the secularist or non-theistic.[21]

The substance of Professor Kallen's address is here unimportant. The important thing is that at this seminar, which was probably the most significant inter-faith gathering held in the United States for many years, the fourth group, whether called "secularist," "non-theistic," or any other name, was recognized by the more than one hundred participants as entitled to a voice in the religious discussions and deliberations of a free society.

A widely-used authoritative survey of American religious beliefs and practices similarly points out the truly religious character of these non-theistic movements, which are described as "nonecclesiastical spiritual movements." It states:[22]

> "Unfortunately this aspect of America's religious life has been the object of but little serious study. Most of these movements do not gain their chief impetus from an organization, their major tenets are almost never set down in formal creeds; and statistics on the number of adherents are either meager or nonexistent • • • Yet such knowledge as we have forces us to the conclusion that these nonecclesiastical movements furnish the vital spiritual orientation of multitudes of the American people • • • and must be taken into account in any realistic appraisal of the religious situation in the United States."

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21 *Religion and Freedom, supra*, note 20, pp. 47-48.

22 Williams, *What Americans Believe and How They Worship* (1952), pp. 351-352.

Neither Buddhism nor Confucianism professes belief in a Supreme Being;[23] yet both are unquestionably regarded and treated as religions. To quote an interesting recent case in California:

> "* * * there are forms of belief generally and commonly accepted as religions and whose adherents, numbering in the millions, practice what is commonly accepted as religious worship, which do not include or require as essential the belief in a deity. Taoism, classic Buddhism, and Confucianism, are among these religions." *Fellowship of Humanity* v. *County of Alameda, et al.*, 153 Cal. App. 2d 673; 315 P.2d 394 (1957).

Thus, to exclude non-theistic belief from the constitutional concept of "religion" would be to exclude, among others, some of the major faiths of the world which are traditionally recognized as "religions."

D. Any Impingement on the Religious Freedom of Some is a Threat to the Religious Freedom of All.

As we have shown, the "fourth faith," the "nonecclesiastical spiritual movements" which do not affirmatively proclaim belief in a Supreme Being, are today important segments of the American religious community. They are, in fact and in law, just as much religions as the traditional faiths which profess a belief in the traditional concepts of God. As such, they, too, are entitled to the full measure of the protection of religious freedom guaranteed by the Constitution.

It is not just the religious freedom of the non-theistic groups which is at stake. Religious freedom is indivisible.

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23 Potter, *The Story of Religion* (1939), xvii-xviii; Archer, *Faiths Men Live By* (1934), p. 270; Hutchinson and Martin, *Ways of Faith* (1953), p. 134.

Any encroachment upon the religious freedom of some must ultimately lead to a weakening of the religious freedom of all. As Professor Joseph L. Blau of Columbia University has written:[24]

> "Under a system such as ours, which maintains the right of the individual to free choice among religious positions, freedom to reject is as allowable as freedom to accept. There is nothing in the written or unwritten traditions of the United States that limits the individual to a choice among patterns of acceptance. In fact, a limitation of this sort is undesirable. Once the precedent is established that the choice must be among prescribed alternatives, it would become easier to narrow the list of alternatives until the language of choice is used in the real absence of choice, as in totalitarian elections. The same freedom to believe, to associate, to speak, to preach, to missionize, and to prophesy must be granted to atheist and theist, agnostic and gnostic, anti-clerical and clergyman, heterodox and orthodox. The rights of those who believe in unbelief must be defended in order to place a secure foundation under the rights of those who believe in belief."

The same thought was expressed by Mr. Justice Jackson in his dissenting opinion in *Zorach* v. *Clauson*, 343 U. S. 306, 325 (1952):

> "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. * * * [I]f we concede to the State power and wisdom to single out 'duly constituted religious' bodies * * * it would be logical to also uphold the power and wisdom to choose

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24 Blau, *Cornerstones of Religious Freedom in America* (1949), p. 15.

> the true faith among those 'duly constituted.'. We start down a rough road when we begin to mix compulsory public education with compulsory godliness."

If it be once established that the State has the *power* to require a declaration of a belief in the existence of God as a condition to holding public office, it is only a short step for the State to require that the belief be in a particular God. The only way effectively to protect the basic religious freedoms which the Constitution guarantees to all Americans—the right to worship or not to worship, to believe in God or not to believe in God, or to hold any theological belief an individual wishes—is to deny the State *any* power to impose a religious test for holding public office. The denial by the State of Maryland of a Notary Public's Commission to appellant solely because of his refusal to declare his belief in God violates this salutary principle.

Conclusion

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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January, 1961